

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FLAVIO MORENO,

Plaintiff,

v.

NEV. DEPT. CORR., *et al.*,

Defendants.

Case No. 3:18-cv-00137-MMD-CLB

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

This case involves a civil rights action filed by Plaintiff Flavio Moreno, (“Moreno”), against Defendants Romeo Aranas (“Aranas”) and Kim Adamson (“Adamson”) (collectively referred to as “Defendants”). Currently pending before the court is Defendants’ motion for summary judgment. (ECF Nos. 29, 31).² Moreno responded (ECF No. 37), and Defendants replied (ECF No. 38). Having thoroughly reviewed the record and papers, the court recommends Defendants’ motion for summary judgment (ECF No. 29) be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

Moreno is an inmate in the custody of the Nevada Department of Corrections (“NDOC”) and is currently housed at the Lovelock Correctional Center (“LCC”), where the events of this case allegedly occurred. (ECF No. 5 at 1). On March 29, 2018, proceeding *pro se*, Moreno submitted a civil rights complaint pursuant to 42 U.S.C. § 1983, which he signed and verified, under penalty of perjury, acknowledging the facts and information contained in the complaint were “true and correct.” (*Id.* at 10). Pursuant to 28 U.S.C. § 1915A(a), the court screened the complaint on April 25, 2019, and issued a screening

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

² ECF No. 31 consists of sealed exhibits filed in support of the motion for summary judgment.

1 order. (ECF No. 4.) The court allowed Moreno to proceed on the portion of Counts I and
 2 II, Eighth Amendment deliberate indifference to serious medical needs and First
 3 Amendment retaliation claims against both Defendants, and further allowed Moreno to
 4 assert a parallel state action for retaliation against both Defendants under the Nevada
 5 Constitution Article I, § 9. (ECF No. 4).³

6 **A. Counts I and II – Deliberate Indifference and Retaliation Claims**

7 Counts I and II of Moreno's complaint allege the following: In 2013, (while housed
 8 at High Desert Prison, "HDSP"), Moreno slipped on a wet floor and fell, injuring his lower
 9 back. (ECF No. 5 at 3-5.) The injury was allegedly caused by a lack of "slippery when
 10 wet" signage. (*Id.*)

11 Moreno's complaint alleges he has, since roughly August 2017, experienced
 12 significant limited mobility and increased severe pain due to the fall. (*Id.*) Moreno alleges
 13 Defendants purposefully hid his medical diagnoses from him, leaving him in severe pain
 14 unnecessarily, simply to avoid the costs of surgery. (*Id.*) Moreno also alleges Defendants
 15 knew the care given to him would not improve his condition but was provided to penalize
 16 him. (*Id.*) Moreno further alleges Defendants left him in severe pain unnecessarily as
 17 punishment for escalating medical costs related to his continued treatment. (*Id.*)
 18 Moreover, Moreno alleges Defendants did so specifically for the purpose of reprisal
 19 against Moreno for redressing his grievances. (*Id.*)

20 Moreno seeks the following remedies: (1) surgical repair of his damaged back at
 21 no cost to him; (2) post-surgery placement in the LCC general population, with a bottom
 22 bunk; (3) cessation of reprisals against him for medical costs and redress of grievances;

24 ³ Moreno also named NDOC as a defendant in his complaint. (See ECF No. 5.)
 25 However, the court dismissed NDOC, with prejudice, pursuant to Eleventh Amendment
 26 immunity. (See ECF No. 4 at 3, n. 1). Further, Moreno's complaint alleged violations of
 27 42 U.S.C. § 1997d, 42 U.S.C. § 13981 and 42 U.S.C. § 12131(1)-(2). (See ECF No. 5.)
 28 However, the court dismissed those claims, with prejudice, because amendment would
 be futile. (See ECF No. 4 at 8.) Moreno further alleged violations of the Nevada
 Constitution Article I, § 10 and NRS §§ 209.131, 209.151, and 200.571. (See ECF No.
 5.) The court also dismissed those claims. (See ECF No. 4 at 8.)

1 (4) \$1,000,000.00 in damages per Defendant; and (5) costs, fees, and interest from each
2 Defendant. (*Id.* at 9).

3 **B. Undisputed Facts Common to Moreno's Claims**

4 The following facts are undisputed by both parties: On October 10, 2010, NDOC
5 created a Medical Master Problem List for Moreno indicating he had suffered from chronic
6 lower back pain since 1994. (ECF No. 31-1 at 2). On February 4, 2013, NDOC created
7 an Unusual Occurrence Report that indicated Moreno, then housed at HDSP, sustained a
8 work-related injury while lifting eggs. (ECF No. 31-2 at 2; see ECF No. 31-4 at 16; see
9 *also* ECF No. 31-3 at 11). Moreno claimed he suffered the injury in his lower back area.
10 (ECF No. 37 at 44). Moreno received prescriptions for Flexeril and Naproxen to treat his
11 lower back injury. (ECF No. 31-4 at 14). On April 9, 2013, Moreno submitted a medical
12 kite claiming he re-injured his back at work during the previous week while carrying a crate.
13 (ECF No. 29-1 at 2).

14 Over two years later, on June 13, 2015, Moreno submitted a medical kite stating
15 that, although he has had back problems for years, he began suffering severe back pain
16 approximately one month prior to submitting the kite. (ECF No. 37 at 43). On June 23,
17 2015, Moreno was given 200mg Ibuprofen tablets, and on July 1, 2015, Moreno was given
18 600mg Ibuprofen tablets. (ECF No. 31-4 at 13). On December 29, 2015, Moreno
19 submitted a medical kite requesting medication and a lower bunk to ameliorate his chronic
20 back pain. (ECF No. 37 at 49). NDOC scheduled Moreno an appointment with Defendant
21 Adamson. *Id.*

22 On January 5, 2016, Moreno was treated by Defendant Adamson for the first time.
23 (See ECF No. 31-3 at 15; see *also* ECF No. 31-4 at 13). Adamson noted Moreno exhibited
24 "manipulative drug seeking behavior," stating Moreno "really wants . . . Narcotics." (ECF
25 No. 31-3 at 15). Nonetheless, Adamson prescribed Naproxen and Baclofen for Moreno
26 to help alleviate Moreno's chronic back pain and neuropathy. (*Id.*) Additionally, Moreno
27 received care three times between January 5, 2016 and August 4, 2016. (See ECF No.
28 31-4 at 12-13). On August 4, 2016, Tahoe Carson Radiology ("TCR") performed lumbar

1 spine x-rays on Moreno at LCC. (ECF No. 31-5 at 7; see ECF No. 31-4 at 12). The x-
2 rays found that Moreno suffered from mild dextroconvex scoliosis in his L1 vertebra and
3 disc space narrowing, mild endplate spurring, and facet arthrosis throughout his L5 and
4 L5-S1 vertebrae. (*Id.*)

5 On August 18, 2016, Moreno requested an appointment for continued severe pain,
6 alleging the doctor “said he would put me on the following week appointment (sic) for
7 cortizone (sic) shots.” (ECF No. 37 at 48). NDOC responded by scheduling an
8 appointment for Moreno early the following week, “per Dr. Adamson.” (*Id.*) On August 22,
9 2016, Adamson prescribed Moreno Naproxen and 800mg Motrin and treated Moreno with
10 Kenalog and Lidocaine injections. (ECF No. 31-4 at 12).

11 On May 30, 2017, Moreno again received Kenalog and Lidocaine injections and
12 Adamson requested an MRI for Moreno and prescribed him 800 mg Motrin tablets and
13 analgesic balm (ECF No. 31-4 at 10, 11, and 15). On August 8, 2017, Moreno obtained a
14 radiology report from Humboldt General Hospital. (ECF No. 31-5 at 5.) The examining
15 physician noted “[m]oderate spinal stenosis at L4-L5 with narrowing of the lateral recesses
16 and possible nerve root impingement.” (*Id.*)

17 On August 15, 2017, Adamson treated Moreno for his chronic back pain, noting
18 Moreno needed to see a back specialist because “meds don’t help.” (ECF No. 31-3 at
19 12). Adamson further noted Moreno’s x-rays showed spondylosis and dextroscoliosis and
20 that Moreno’s MRI showed nerve root compression and spinal stenosis. (*Id.*) Adamson
21 prescribed Moreno 20mg Baclofen and 800mg Motrin and noted Moreno needed an “ortho
22 or neurosurgical” consultation. (ECF No. 31-4 at 11).

23 On August 24, 2017, Moreno filed a NDOC administrative claim form demanding
24 \$150,000 for events occurring at HDSP and LCC from 2013 “to present day.” (ECF No.
25 29-4 at 15). Moreno further attached a seven-page informal grievance form to his demand.
26 (*Id.* at 9-14; ECF No. 5 at 19). Moreno’s grievance alleged NDOC had failed to treat the
27 injuries Moreno purportedly sustained while working for NDOC during his incarceration.
28 (*Id.* at 9.) Moreno’s grievance further alleged his medical care at HDSP and LCC was

1 constitutionally inadequate. (*Id.* at 9-14; ECF No. 5 at 19). Moreno demanded (1) cost-
2 free surgical repair; (2) bottom bunk placement until surgical repair is performed; (3)
3 effective pain relief management; (4) cessation of reprisal against Moreno for medical
4 costs and redress of grievance; and (5) \$150,000.00. (ECF No. 29-4 at 11). NDOC
5 responded by denying Moreno's grievance. (ECF No. 29-4 at 8).

6 On September 26, 2017, Moreno submitted a medical kite requesting information
7 on the status of his surgery approval. (ECF No. 37 at 47). NDOC responded that Moreno
8 was already approved to see a neurosurgeon and arrangements were still being made.
9 (*Id.*) On October 4, 2017, Moreno was given 60mg Toradol for his pain. (ECF No. 31-3
10 at 12). On October 10, 2017, Moreno filed a first level grievance form requesting the
11 "same claim same remedy" as his informal grievance. (ECF No. 29-4 at 6). NDOC
12 responded by denying Moreno's grievance. (*Id.*)

13 On October 17, 2017, Moreno received additional spine x-rays from TCR. (ECF
14 No. 31-5 at 6). The x-rays found mild spondylosis and disc space loss among the L4 and
15 L5 vertebrae and moderate spondylosis and endplate remodeling at the L5-S1 vertebra.
16 (*Id.*) On November 27, 2017, the Sierra Neurosurgery Group ("SNG") examined Moreno
17 and conducted an MRI. (ECF No. 31-6 at 2-4). SNG recommended an L4-5 steroid
18 injection to see if the injection could help Moreno manage his pain. (*Id.* at 3). Further,
19 SNG recommended that if the injection failed to provide long-lasting relief, Moreno "may
20 benefit from an L4/5 laminectomy." (*Id.*) On December 12, 2017, Moreno submitted a
21 second level grievance form, completing the formal grievance process. (ECF No. 29-4 at
22 2, 4). On January 30, 2018, Defendant Aranas responded by denying Moreno's grievance.
23 (*Id.* at 3).

24 On January 31, 2018, Moreno was seen by NDOC care providers to discuss his
25 latest lab results and treatment plan. (ECF No. 31-3 at 2). At that meeting, Moreno
26 threatened to sue NDOC. (*Id.*) On February 27, 2018, Moreno sent Inmate Institutional
27 Correspondence to then LCC Warden Renee Baker ("Baker"), alleging he had not
28 received injections or surgery for three and one-half months. (ECF No. 37 at 52). On

1 March 16, 2018, Baker responded that medical was “attempting to find a doctor to do the
2 injections.” (*Id.*) By the time Baker responded, Moreno had already been seen by medical
3 ten days earlier. (See ECF Nos. 31-4 at 10 and 31-3 at 7). On March 29, 2018, Moreno
4 filed his complaint against Defendants, alleging deliberate indifference and retaliation
5 around August 2017. (ECF No. 5 at 1).

6 According to Moreno’s medical records, during the roughly two-year period
7 between him meeting Defendant Adamson and filing his complaint, Moreno was seen by
8 NDOC medical providers on at least fourteen separate dates and prescribed medication
9 for his back pain and neuropathy at least seven times. (See ECF Nos. 31-3 and 31-4).
10 Further, Moreno received multiple MRIs and x-rays during the same time period. (See
11 ECF Nos. 31-5 at 5-7 and 31-6 at 2-4).

12 **C. Defendants’ Motion for Summary Judgment**

13 On March 12, 2020, Defendants filed a motion for summary judgment (ECF Nos.
14 29, 31). Defendants argue they are entitled to summary judgment because Defendants
15 were not deliberately indifferent to Moreno, and alternatively, Defendants are entitled to
16 qualified immunity and discretionary immunity. (*Id.* at 11-20). Moreno opposed the
17 motion, (ECF No. 37), and Defendants replied (ECF No. 38). The recommended
18 disposition follows.

19 **II. LEGAL STANDARD**

20 Summary judgment should be granted when the record demonstrates that “there
21 is no genuine issue as to any material fact and the movant is entitled to judgment as a
22 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “[T]he substantive
23 law will identify which facts are material. A dispute is “genuine” only where a reasonable
24 jury could find for the nonmoving party. *Id.* Conclusory statements, speculative opinions,
25 pleading allegations, or other assertions uncorroborated by facts are insufficient to
26 establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th
27 Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996).

28 Summary judgment proceeds in burden-shifting steps. A moving party who does

1 not bear the burden of proof at trial “must either produce evidence negating an essential
2 element of the nonmoving party’s claim or defense or show that the nonmoving party
3 does not have enough evidence of an essential element” to support its case. *Nissan Fire*
4 *& Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the
5 moving party must demonstrate, on the basis of authenticated evidence, that the record
6 forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as
7 to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285
8 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising
9 therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763
10 F.3d 1060, 1065 (9th Cir. 2014).

11 Where the moving party meets its burden, the burden shifts to the nonmoving party
12 to “designate specific facts demonstrating the existence of genuine issues for trial.” *In re*
13 *Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). “This burden
14 is not a light one,” and requires the nonmoving party to “show more than the mere
15 existence of a scintilla of evidence. . . . In fact, the non-moving party must come forth
16 with evidence from which a jury could reasonably render a verdict in the non-moving
17 party’s favor.” *Id.* (citations omitted). The nonmoving party may defeat the summary
18 judgment motion only by setting forth specific facts that illustrate a genuine dispute
19 requiring a factfinder’s resolution. *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324.

20 For purposes of opposing summary judgment, the contentions offered by a *pro se*
21 litigant in motions and pleadings are admissible to the extent that the contents are based
22 on personal knowledge and set forth facts that would be admissible into evidence and the
23 litigant attested under penalty of perjury that they were true and correct. *Jones v. Blanas*,
24 393 F.3d 918, 923 (9th Cir. 2004).

25 **III. DISCUSSION**

26 **A. Deliberate Indifference to Serious Medical Needs**

27 The Eighth Amendment “embodies broad and idealistic concepts of dignity, civilized
28 standards, humanity, and decency” by prohibiting the imposition of cruel and unusual

1 punishment by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation
2 omitted). The Amendment’s proscription against the “unnecessary and wanton infliction
3 of pain” encompasses deliberate indifference by state officials to the medical needs of
4 prisoners. *Id.* at 104 (internal quotation omitted). It is thus well established that “deliberate
5 indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”
6 *Id.* at 106.

7 Courts in this Circuit employ a two-part test when analyzing deliberate indifference
8 claims. The plaintiff must satisfy “both an objective standard—that the deprivation was
9 serious enough to constitute cruel and unusual punishment—and a subjective standard—
10 deliberate indifference.” *Colwell*, 763 F.3d at 1066 (internal quotation omitted). First, the
11 objective component examines whether the plaintiff has a “serious medical need,” such
12 that the state’s failure to provide treatment could result in further injury or cause
13 unnecessary and wanton infliction of pain. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
14 2006). Serious medical needs include those “that a reasonable doctor or patient would
15 find important and worthy of comment or treatment; the presence of a medical condition
16 that significantly affects an individual’s daily activities; or the existence of chronic and
17 substantial pain.” *Colwell*, 763 F.3d at 1066 (internal quotation omitted).

18 Second, the subjective element considers the defendant’s state of mind, the extent
19 of care provided, and whether the plaintiff was harmed. “Prison officials are deliberately
20 indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally
21 interfere with medical treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)
22 (internal quotation omitted). However, a prison official may only be held liable if he or she
23 “knows of and disregards an excessive risk to inmate health and safety.” *Toguchi v.*
24 *Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). The defendant prison official must therefore
25 have actual knowledge from which he or she can infer that a substantial risk of harm
26 exists, and also make that inference. *Colwell*, 763 F.3d at 1066. An accidental or
27 inadvertent failure to provide adequate care is not enough to impose liability. *Estelle*, 429
28 U.S. at 105–06. Rather, the standard lies “somewhere between the poles of negligence

1 at one end and purpose or knowledge at the other” *Farmer v. Brennan*, 511 U.S.
2 825, 836 (1994). Accordingly, the defendants’ conduct must consist of “more than
3 ordinary lack of due care.” *Id.* at 835 (internal quotation omitted) (see *Wood v.*
4 *Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (“[M]ere malpractice, or even gross
5 negligence” in the provision of care fails to state a deliberate indifference claim).

6 Similarly, an “isolated exception” to an inmate’s “overall treatment” does not state
7 a deliberate indifference claim. *Jett*, 439 F.3d at 1096. Further, a difference of opinion
8 between a physician and a prisoner – or between medical professionals – concerning
9 what medical care is appropriate does not amount to deliberate indifference. *Wilhelm v.*
10 *Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jackson v. McIntosh*, 90 F.3d 330,
11 332 (9th Cir. 1986). Instead, the prisoner “must show that the course of treatment the
12 doctors chose was medically unacceptable under the circumstances and that the
13 defendants chose this course in conscious disregard of an excessive risk to [his] health.”
14 *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012) (overruled, in part, on other grounds
15 by *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)) (quoting *Jackson*, 90 F.3d at 332). A
16 “mere delay of surgery, without more, is insufficient to state a claim of deliberate medical
17 indifference.” *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 406-07
18 (9th Cir. 1985) (finding that the failure of prison authorities to respond to cumulative,
19 repeated demands for surgery did not itself constitute deliberate indifference).

20 Defendants argue they are entitled to summary judgment on the deliberate
21 indifference claim with respect to both defendants because the evidentiary record shows
22 Defendant Adamson took proper and diligent care of Moreno. (ECF No. 29 at 9-14).
23 Defendants further argue no causal connection exists between any action taken by
24 Aranas and any harm suffered by Moreno. (*Id.*)

25 Based on the evidence before the court, and in viewing all facts and drawing all
26 inferences in the light most favorable to Moreno, the court finds summary judgment
27 should be granted in favor of both defendants on the deliberate indifference claim.
28 Defendants have, on the basis of authenticated evidence, shown that the record

1 forecloses the possibility of a reasonable jury finding in Moreno's favor. *Celotex*, 477
2 U.S. at 323. Accordingly, the burden shifts to Moreno to "designate specific facts
3 demonstrating the existence of genuine issues for trial." *In re Oracle Corp.*, 627 F.3d at
4 387. Moreno has failed to carry his burden.

5 First, it is undisputed that Moreno's chronic back problems constitute a serious
6 medical need. *Colwell*, 763 F.3d at 1066. Thus, the only issue is whether Plaintiff has
7 come forward with some evidence to establish a genuine issue of fact that Defendants
8 knew of and disregarded "an excessive risk to [Moreno's] health and safety." *Toguchi*,
9 391 F.3d at 1057.

10 Moreno has failed to come forward with any evidence to establish a genuine
11 dispute of fact on that issue. Instead, Moreno simply asserts several arguments as to
12 why his claim should proceed. These arguments boil down to the following relevant
13 allegations: (1) Defendants conspired with SNG and others to prevent Moreno from
14 receiving the proper surgical procedure; (2) Moreno was subjected to undue delay in
15 surgery as a result of Defendants' use of the URP procedure; (3) Defendant Adamson
16 pursued an ineffective treatment strategy; and (4) Adamson's delays and ineffective
17 treatment strategy resulted in Moreno suffering unduly, constituting an unnecessary and
18 wanton infliction of pain. (See ECF No. 37.) Moreno's opposition included various
19 medical kites, grievance forms, and inmate request forms submitted as evidence. (See
20 *id.*) However, Moreno's evidence does not create a genuine dispute as to whether
21 Defendants were deliberately indifferent to him. None of those items establish that either
22 Adamson or Aranas were medically indifferent to Moreno's medical condition.

23 As to the evidence submitted by Defendants, medical records show Defendant
24 Adamson treated Moreno with Kenalog and Lidocaine injections and provided him with
25 two pain medications during their first meeting together, despite Adamson's concerns
26 about Moreno's relationship with narcotics. (ECF No. 31-4 at 12). Thereafter, Moreno
27 continued to receive earnest care from Adamson, as evidenced by Moreno being seen at
28 least fourteen times in two years prior to his suing Adamson, the many prescription and

1 other medications provided to Moreno by Adamson, Adamson's treatment of Moreno's
2 back with injections and balm, and Adamson's repeated deference to experts to ensure
3 Moreno received multiple MRIs and x-rays. (See ECF Nos. 31-3 and 31-4; see *a/so* ECF
4 Nos. 31-5 at 5-7 and 31-6 at 2-4).

5 By contrast, Moreno has provided no evidence to contradict his medical records.
6 Rather, he simply argues that Adamson conspired with others to fashion a remedy
7 provided by outside provider SNG; that the use of the Utilization Review Panel ("URP")
8 for outside treatment constituted a delay in his medical care; that Adamson pursued an
9 ineffective treatment strategy; and that the delays and ineffective treatment resulted in
10 Moreno suffering severe pain needlessly. However, these arguments are not evidence
11 for purposes of creating an issue of fact and are contradicted by the evidence.

12 Although Moreno claims Defendants conspired to interfere with his medical care,
13 the record shows that Adamson repeatedly deferred to experts and outside organizations
14 to ensure Moreno received appropriate care. Moreno has provided no evidence that
15 Defendants conspired to interfere with his medical care in any way, and thus he cannot
16 establish a genuine issue of fact exists regarding Defendants' alleged interference.

17 Further, Defendants are bound by AR § 613.02(1)(A), which requires all outside
18 medical treatment to have prior approval from the URP. Defendants' adherence to
19 institutional protocols does not show the type of subjective mental component necessary
20 to establish deliberate indifference. See *Farmer*, 511 U.S. at 835 (deliberate indifference
21 is "a state of mind more blameworthy than negligence," requiring "more than ordinary
22 lack of due care for the prisoner's interests or safety.") (quoting *Whitley v. Albers*, 475
23 U.S. 312, 319). Moreover, a "mere delay of surgery, without more, is insufficient to state
24 a claim of deliberate medical indifference." *Shapley*, 766 F.2d at 407. Moreno has
25 provided no evidence his surgery was delayed at all and thus he cannot establish a
26 genuine issue of fact exists regarding Defendants' use of the URP.

27 During the time he was treated by Defendant Adamson, prior to the filing of his
28 complaint, Moreno was seen by NDOC medical providers on at least fourteen separate

1 dates and prescribed medication for his back pain and neuropathy at least seven times.
2 (See ECF Nos. 31-3 and 31-4). Furthermore, Moreno received multiple MRIs and x-rays
3 during the same timeframe. (See ECF Nos. 31-5 at 5-7 and 31-6 at 2-4). Moreno's bare
4 allegations that Adamson's treatment strategy was ineffective are insufficient to establish
5 a genuine dispute regarding deliberate indifference. Instead, Moreno "must show that
6 the course of treatment the doctors chose was medically unacceptable under the
7 circumstances and that the defendants chose this course in conscious disregard of an
8 excessive risk to [his] health." *Snow*, 681 F.3d at 988. Moreno has failed to produce any
9 evidence that could make such a showing.

10 While Moreno is plainly dissatisfied with the medical treatment he received from
11 Defendants, Moreno has failed to provide evidence creating a genuine dispute whether
12 that medical treatment was appropriate. See *Taplet v. Brooks*, 432 Fed. Appx. 697, 698
13 (9th Cir. 2011) (finding that Plaintiff's own allegations, unsupported by expert testimony,
14 were insufficient to create a dispute of fact over whether care was medically acceptable)
15 (citing *Clouthier v. Cnty. Of Contra Costa*, 591 F.3d 1232, 1252 (9th Cir. 2010) (overruled,
16 in part, on other grounds by *Castro v. Cnty. Of Los Angeles*, 833 F.3d 1060 (9th Cir.
17 2016))). Therefore, Moreno's opinions about the care he received from Defendants are
18 not evidence that Defendants' care was improper. A mere difference of opinion between
19 a physician and a prisoner – or between medical professionals – concerning what medical
20 care is appropriate does not amount to deliberate indifference. *Wilhelm*, 680 F.3d at
21 1122. Consequently, Moreno has provided no evidence that Adamson consciously
22 disregarded a known risk to Moreno's health or safety. Thus, Moreno cannot establish a
23 genuine dispute regarding whether Adamson pursued an ineffective treatment strategy.

24 Further, because Moreno cannot show Adamson delayed his medical care or
25 pursued an ineffective treatment strategy, Moreno cannot show that Adamson caused
26 Moreno an unnecessary and wanton infliction of pain. Moreno has provided no evidence
27 Adamson had a blameworthy state of mind or that Adamson let him suffer needlessly.
28 See *Farmer*, 511 U.S. at 835. Indeed, the record shows Adamson tried to alleviate

1 Moreno's pain and suffering in good faith. Thus, Moreno cannot establish that a genuine
2 dispute remains as to whether Adamson's alleged delays and purported ineffective
3 treatment strategy caused him unnecessary pain.

4 Moreover, as to Defendant Aranas, there is no evidence to establish that Aranas
5 was involved in Moreno's treatment in any way. Rather, the sole piece of evidence
6 Moreno has provided indicating the involvement of Aranas in this matter in any capacity
7 whatsoever is Aranas's denial of Moreno's second level grievance form. (ECF No. 29-4
8 at 3). Responding to Moreno's grievance is insufficient to establish that Aranas was
9 indifferent to Moreno's medical needs.

10 Accordingly, the court recommends Defendants' motion for summary judgment
11 (ECF No. 29) be granted in favor of both defendants on the Eighth Amendment deliberate
12 indifference to Moreno's serious medical needs claim.

13 **B. First Amendment Retaliation under State and Federal Law**

14 Next, Defendants seek summary judgment on the First Amendment retaliation
15 claim and a parallel state action under the Nevada Constitution Article I, § 9. (ECF No.
16 29 at 9-11.) Prisoners have a general right to be free from retaliatory punishment.
17 *Shepard v. Quillen*, 840 F.3d 686, 693 (9th Cir. 2016) (citing *Rhodes v. Robinson*, 408
18 F.3d 559, 569 (9th Cir. 2005)). "Prisoners have a First Amendment right to file grievances
19 against prison officials and be free from retaliation for doing so." *Watison v. Carter*, 668
20 F.3d 1108, 1114 (9th Cir. 2012). Indeed, the Ninth Circuit has stated "the mere *threat* of
21 harm" may be enough to amount to a violation, "regardless of whether it is carried out
22 because the threat itself can have a chilling effect." *Brodheim v. Cry*, 584 F.3d 1262,
23 1269 (9th Cir. 2009) (emphasis in original). "[A] threat of retaliation is sufficient injury if
24 made in retaliation for an inmate's use of prison grievance procedures." *Id.* (citation
25 omitted).

26 "A prison inmate retains those First Amendment rights that are not inconsistent
27 with his status as a prisoner or with the legitimate penological objectives of the corrections
28 system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). "Within the prison context, a viable

1 claim of First Amendment retaliation entails five basic elements: (1) An assertion that a
2 state actor took some adverse action against an inmate (2) because of (3) that prisoner's
3 protected conduct, and that such action (4) chilled the inmate's exercise of his First
4 Amendment rights, and (5) the action did not reasonably advance a legitimate
5 correctional goal." *Rhodes*, 408 F.3d at 567-68. The adverse action must be such that
6 it "would chill or silence a person of ordinary firmness from future First Amendment
7 activities." *Watison*, 668 F.3d at 1114 (quoting *Rhodes*, 408 F.3d at 568).

8 Defendants argue Adamson could not have retaliated against Moreno because
9 Adamson was largely unaware of Moreno's grievances and did not personally respond to
10 any of them. (ECF No. 29 at 10-11). Moreover, Defendants argue no causal connection
11 exists between any action taken by Aranas and any harm suffered by Moreno. (*Id.*)

12 Based on the evidence before the court, and in viewing all facts and drawing all
13 inferences in the light most favorable to Moreno, the court finds summary judgment on
14 the retaliation claim should be granted in favor of both Defendants. Defendants' evidence
15 forecloses the possibility of a reasonable jury finding in favor of Moreno. *Celotex*, 477
16 U.S. at 323. Thus, the burden shifts to Moreno to "designate specific facts demonstrating
17 the existence of genuine issues for trial." *In re Oracle Corp.*, 627 F.3d at 387. Again,
18 Moreno has failed to meet his burden.

19 Moreno's relevant arguments include the following: (1) Defendants retaliated
20 against Moreno by delaying or interfering with his medical care because he required
21 significant, expensive care; and (2) Defendants retaliated against Moreno by delaying or
22 interfering with his medical care because he filed grievances and medical kites. (See
23 SEC No. 37). However, Moreno is unable to create a triable issue as to whether
24 Defendants retaliated against him.

25 Much of the delay in medical care Moreno alleges was intentional retaliation was,
26 in fact, simple adherence to NDOC regulations like AR § 613. Approved institutional
27 regulations undoubtedly have a legitimate penological purpose and thus compliance with
28 those regulations is not retaliation. See *Rhodes*, 408 F.3d at 567-68. Similarly,

Adamson's failure to provide Moreno with specialist-recommended medications for purposes not authorized by NDOC had a legitimate penological purpose because NDOC has a keen interest in keeping powerful neurological drugs out of circulation in its facilities. See *id.* Therefore, such failure does not amount to retaliation. Moreover, the record shows Moreno continued to receive diligent and attentive medical care long after the filing of his complaint in March 2018, and that Moreno continued to use prison grievance procedures both before and after the filing of his complaint.⁴ Because Moreno cites no facts and offers no evidence that would create a genuine dispute, he consequently fails to shift his burden back to Defendants.

Accordingly, the court recommends Defendants' motion for summary judgment (ECF No. 29) be granted in favor of both Defendants on the First Amendment retaliation claim and the parallel state retaliation claim under the Nevada Constitution Article I, § 9.⁵

IV. CONCLUSION

For good cause appearing and for the reasons stated above, the court recommends Defendants' motion for summary judgment (ECF No. 29) be granted.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

⁴ Moreno's opposition included various medical kites, grievance forms, and inmate request forms. (See ECF No. 37.) Indeed, Moreno's own evidence, in addition to Defendants' evidence, establishes that he was not chilled from redressing his grievances, despite Moreno's contentions to the contrary.

⁵ Where the court determines a plaintiff's allegations fail to show a statutory or constitutional violation, "there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, Moreno is unable to establish a violation of his rights under either the United States or the Nevada constitutions. Accordingly, there is no need for the court to address Defendants' arguments related to qualified immunity or discretionary immunity.


2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Defendants' motion for summary judgment (ECF No. 29) be **GRANTED**; and

IT IS FURTHER RECOMMENDED that the Clerk **ENTER JUDGMENT** accordingly.

DATED: July 9, 2020.


UNITED STATES MAGISTRATE JUDGE